

Decision _____

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Application of SAN DIEGO GAS & ELECTRIC COMPANY under the Catastrophic Event Memorandum Account (CEMA) for Recovery of costs related to the 2003 Southern California Wildfires. (U 902-M)

Application 04-06-035
(Filed June 28, 2004)

**OPINION GRANTING INTERVENOR COMPENSATION
TO THE UTILITY CONSUMERS ACTION NETWORK FOR SUBSTANTIAL
CONTRIBUTIONS TO DECISION 05-08-037**

1. Summary

This decision awards The Utility Consumers' Action Network (UCAN) \$59,388.92 for its substantial contributions to Decision (D.) 05-08-037, on San Diego Gas & Electric Company's (SDG&E) 2003 Southern California Wildfires Recovery (Wildfires).

2. Background

SDG&E applied to recover in retail rates the California jurisdictional costs associated with the Wildfires. SDG&E allocated \$8.4 million to transmission service subject to the Federal Energy Regulatory Commission's (FERC) jurisdiction, and \$62.7 million to California-jurisdictional gas and electric service. SDG&E reduced this latter amount by \$21.9 million to reflect funds already authorized in retail rates. The remaining \$40.8 million are the residual incremental costs that SDG&E recovered in D.05-08-037.

UCAN actively participated in evidentiary hearings, examined SDG&E's application and testimony, and critiqued the Office of Ratepayer Advocates'

(ORA) review. Decision 05-08-037 adopted SDG&E's request. The decision rejected UCAN's proposed adjustments but adopted many of the findings recommended by UCAN.

3. Requirements for Awards of Compensation

The intervenor compensation program, enacted in Pub. Util. Code §§ 1801-1812,¹ requires California jurisdictional utilities to pay the reasonable costs of an intervenor's participation if the intervenor makes a substantial contribution to the Commission's proceedings. The statute provides that the utility may collect the amount awarded from its ratepayers.

To be compensated, an intervenor must satisfy all of the following procedures and criteria:

- a. The intervenor must satisfy certain procedural requirements including the filing of a sufficient notice of intent (Notice) to claim compensation within 30 days of the prehearing conference (or in special circumstances, at other appropriate times that we specify). (§ 1804(a).)
- b. The intervenor must be a customer or a participant representing consumers, customers, or subscribers of a utility subject to our jurisdiction. (§ 1802(b).)
- c. The intervenor should file and serve a request for a compensation award within 60 days of our final order or decision in a hearing or proceeding. (§ 1804(c).)
- d. The intervenor must demonstrate "significant financial hardship." (§§ 1802(g), 1804(b)(1).)
- e. The intervenor's presentation must have made a "substantial contribution" to the proceeding, through the adoption, in whole or in part, of the intervenor's contention

¹ All code references are to the California Pub. Util. Code.

or recommendations by a Commission order or decision.
(§§ 1801(1), 1803(a).)

- f. The claimed fees and costs are reasonable and are comparable to the market rates paid to experts and advocates having comparable training and experience and offering similar services. (§ 1806.)

For discussion here, the procedural issues in Items a-d above are combined, followed by separate discussions on Items e and f.

4. Procedural Issues

A prehearing conference was held on August 17, 2004. UCAN filed a timely Notice on August 30, 2004. On September 15, 2004, Administrative Law Judge (ALJ) Long ruled that UCAN is a customer pursuant to § 1802(b)(1)(C), and meets the financial hardship condition under § 1804(b)(1). UCAN filed a request for compensation on October 11, 2005, within 60 days of D.05-08-037. UCAN has therefore satisfied all the procedural requirements necessary to make its request for compensation.

5. Substantial Contribution

We look at several things to evaluate whether a customer made a substantial contribution. First, did the ALJ or Commission adopt one or more of the factual or legal contentions, or specific policy or procedural recommendations put forward by the customer? (*See* § 1802(i).) Second, if the customer's contentions or recommendations paralleled those of another party, did the customer's participation materially supplement, complement, or contribute to the presentation of the other party or to the development of a fuller record that assisted the Commission in making its decision? (*See* §§ 1802(i) and 1802.5.) As described in § 1802(i), the assessment of whether the customer made a substantial contribution requires the exercise of judgment.

In assessing whether the customer meets this standard, the Commission typically reviews the record, composed in part of pleadings of the customer and, in litigated matters, the hearing transcripts, and compares it to the findings, conclusions, and orders in the decision to which the customer asserts it contributed. It is then a matter of judgment as to whether the customer's presentation substantially assisted the Commission. (D.98-04-059, 79 CPUC2d, 628 at 653.)

Should the Commission not adopt any of the customer's recommendations compensation may be awarded when, in the judgment of the Commission, the customer's participation otherwise substantially contributed to the decision or order. With this guidance in mind, we turn to the claimed contributions UCAN made to the proceeding.

D.05-08-037 did not adopt UCAN's ratemaking recommendations. However, the proposed decision of ALJ Long did adopt most of UCAN's recommendations. UCAN proposed several specific disallowances. For example, UCAN argued SDG&E failed to exercise reasonable control over its service vendors. UCAN also asserted SDG&E did not offset incremental costs with an existing rate allowance for the ongoing costs for pole inspection and replacement. Finally, UCAN proposed to allocate costs differently between expense and capital.

The Commission's final decision does not adopt these recommendations. However, both the proposed and final decisions find that UCAN was the only party to examine not just whether the Wildfire costs were incremental to existing rates (one of the requirements for catastrophic event recovery) but also whether SDG&E met its obligation to exercise reasonable control over its costs – which is a requirement for all regulatory accounts. ORA's analysis was limited to whether (1) the costs were incremental to allowances existing in rates, and (2) the

costs were incurred solely to restore service after the Wildfires.² By successfully insisting that the Commission review the reasonableness of UCAN's Wildfires costs, UCAN provided an important specific policy recommendation adopted by the Commission. The recommendation is a "substantial contribution" (*see* § 1802(i) and establishes UCAN's entitlement to compensation for its work in preparing and presenting that recommendation. (*Id.*)

As noted earlier, a participant may sometimes make a substantial contribution even when the participant's positions are not adopted in the final determination of the issues considered in the proceeding. UCAN cites D.01-06-063 in its request where the Commission awarded compensation to The Utility Reform Network (TURN). TURN objected to a settlement proposed by ORA and the applicant. The ALJ's proposed decision in that proceeding addressed TURN's concerns, but the Commission rejected the entire settlement, making TURN's concerns moot. Nevertheless, the Commission compensated TURN because the ALJ's proposed decision addressed TURN's concerns:

The matter of allocating a revenue requirement in D.01-02-075 is moot. Nevertheless, the PD clearly adopted TURN's proposed cost allocation methodology and its supporting arguments. The question we must determine is whether TURN should be compensated for its substantial contribution to the proceeding and the PD although this was not the decision ultimately adopted.

There is sufficient precedent for compensating TURN for its expenses. In D.92-08-030 we stated, "In cases where the Commission does not wholly adopt the customer's position, contribution to an ALJ's proposed decision reinforces a substantial contribution to an order or decision."

² *See*, for example, Transcript pp. 128-129.

(D.92-08-030, p. 4.) We also cited this opinion in D.96-09-024, where we stated, “This reinforcement of TURN’s substantial contribution is also applicable in the instant case, since on some issues where TURN’s position was ultimately rejected by the Commission, this position was adopted either in the ALJ’s proposed decision, or the . . . alternate.” (D.96-09-024, p. 19.) Applying these precedents to this matter, it is clear that TURN substantially contributed on the issue of cost allocation to the PD, and should be compensated for that contribution. (D.01-06-063, *mimeo*, pp. 5-6.)

UCAN cites other examples (pp. 3-4) where the Commission recognized that parties make a substantial contribution regardless of whether their position prevails. UCAN made a substantial contribution when it was the only party that examined SDG&E’s costs for reasonableness. UCAN’s participation was critical to that examination, and we find that to that extent UCAN made a substantial contribution to D.05-08-037.

6. SDG&E’s Opposition

SDG&E filed comments opposing UCAN’s compensation request, and UCAN filed a reply. SDG&E suggests that “(w)hile the Commission may decide to grant UCAN a modest sum to cover a minimal amount of time used to review SDG&E’s costs, awarding UCAN’s full request . . . is completely unwarranted.” (Comments, p. 2.) SDG&E argues that:

- (1) The Commission did not adopt any of UCAN’s recommendations.
- (2) UCAN’s participation did not “enhance the Commission’s analysis or understanding of the issues or provide value for future proceedings.”
- (3) Contributing to a proposed decision is insufficient to justify an award.
- (4) Compensation is intended to encourage “effective and efficient” participation. (Citing § 1801.3.)

We find that these arguments do not refute the foregoing substantial contribution analysis. SDG&E has a specific obligation under its Catastrophic Event Memorandum Account (CEMA) to restore service but in doing so, SDG&E is limited to recovery of its reasonable costs. UCAN examined and raised objections to the reasonableness of SDG&E's response to the Wildfires. We agreed with UCAN on policy but not on the factual issues. Specifically, we were not persuaded by UCAN that SDG&E's controls were inadequate or its costs were excessive; we therefore found that SDG&E met its burden of proof to demonstrate its costs were both reasonable and incremental to existing allowances in rates. As a result, the Commission granted SDG&E the relief sought. By upholding the policy that even emergency expenditures must be prudent, UCAN's argument was vindicated.

In D.00-02-036 the Commission granted compensation to TURN, James Weil, and UCAN where SDG&E objected to TURN's request.³ UCAN was not the direct subject of SDG&E's objection, but the issue is similar to this protest.⁴ The decision adopted an adjustment to compensation where

³ A.98-05-019, filed on May 8, 1998, *Application of San Diego Gas & Electric Company (U 902-M) for Authority (i) to Increase its Authorized Return on Common Equity, (ii) to Adjust its Existing Ratemaking Capital Structure, (iii) to Adjust its Authorized Embedded Costs of Debt and Preferred Stock, (iv) to Decrease its Overall Rate of Return, and (v) to Revise its Electric Distribution and Gas Rates Accordingly, and for Related Substantive and Procedural Relief.*

⁴ SDG&E has only protested six other compensation requests since 1998; two involved requests by UCAN. In the only other instance, in D.05-09-011 the Commission rejected SDG&E's contention that UCAN could not recover intervenor costs for judicial review when UCAN did not prevail at the Court of Appeal. But the Commission found UCAN made a substantial contribution to two related decisions, D.02-12-064 and D.03-08-072, and the cost of obtaining judicial review in the Court of Appeal was compensable

Footnote continued on next page

“Weil either (sic) did not prevail fully on certain issues, duplicated other parties’ efforts, or claimed compensation for overlapping time spent in relation to certain issues.” (Finding of Fact 5.) It is not clear how much of the adjustment, if any, was predicated solely on Weil’s failure to prevail on the issue. As discussed elsewhere, however, the Commission more recently found in D.01-06-063⁵ that TURN did not have to prevail in order to make a substantial contribution. D.01-06-063 cites D.92-08-030: “(i)n cases where the Commission does not wholly adopt the customer’s position, contribution to an ALJ’s proposed decision reinforces a substantial contribution to an order or decision.” (*Mimeo.*, p. 4.) This blunts SDG&E’s suggestion that it is necessary for UCAN to have prevailed on the factual issues, and it refutes SDG&E’s suggestion that contributing only to the ALJ’s proposed decision is an insufficient contribution.

SDG&E’s two remaining contentions were not persuasive that UCAN’s participation did not “enhance the Commission’s analysis or understanding of the issues,” or that UCAN was ineffective or inefficient. As shown in D.05-08-037, “ORA’s examination of SDG&E’s actions was focused on ensuring that only incremental costs were included in the Wildfire Account. ...” (Finding of Fact 6, partial quote) and, “ORA did not review the reasonableness of expenditures for a cost causation perspective or from a cost reduction or avoidance perspective.” (Finding of Fact 7.) In a CEMA proceeding, the Commission is not solely concerned that the costs are “incremental,” it must also find the costs are reasonable in order to lawfully authorize recovery in retail

because that decision clarified the decisional law in a manner consonant with UCAN’s substantial contribution.

⁵ *Mimeo.*, p. 5.

rates. UCAN did not duplicate ORA's analysis, and was not inefficient, even if the Commission was not persuaded.

Again in D.05-08-037, even though it rejected UCAN's recommendations, the Commission explicitly found "UCAN applied an additional reasonableness test to SDG&E's request. UCAN proposed that costs incurred by SDG&E should be compared to a fair market price for the commodity." (Finding of Fact 8.)

Therefore, we find UCAN did assist in the Commission's "analysis or understanding of the issues" even if it was unpersuasive in this instance.⁶ Though UCAN's recommendations were not adopted, D.05-08-037 set boundaries for intervenors, enunciating why recommendations failed, so future proceedings will benefit when formulating recommendations in subsequent CEMA applications.

7. Reasonableness of Requested Compensation

In general, the components of this request must constitute reasonable fees and costs directly associated with the customer's preparation for and participation in a proceeding that resulted in the substantial contribution.

UCAN organized its costs in 5 categories: General Preparation (including discovery), ORA's Review, Food Costs, Accounting Issues, and Post-hearing Work (Briefs & Comments). After reviewing UCAN's initial request, the ALJ asked for some clarification. This decision relies on the data in the request and clarifying supplement.⁷ UCAN requests \$67,406.77, as follows:

Requested Hourly Rates and Costs

⁶ Finding of Fact 11: "SDG&E exercised reasonable control over all vendor costs, including the costs of meals, snacks and drinks."

⁷ UCAN submitted corrected tables on October 20, 2005.

	Year	Rate	Hours Billed	Total Fees
Shames	2004-5	\$250	75.20	\$18,800.00
Biddle	2004	\$185	120.9	\$22,366.50
JBS Energy – Schilberg	2004	\$150-165	166.7	\$25,022.85
JBS Energy – Marcus	2004	\$195	2.84	\$553.80
Miscellaneous				\$663.62
Total Request				\$67,406.77

Costs Allocated by Issue

	General Preparation	ORA Review	Food Costs	Accounting	Post-Hearing	Total
Shames	\$2,820	\$3,760	\$3,760	\$940	\$7,520	\$18,800
Biddle	\$5,591.64	\$3,354.97	\$3,354.97	\$3,354.97	\$6,709.95	\$22,366.50
JBS Energy	\$3,836.50	0	\$5,115.33	\$10,230.66	\$6,394.16	\$25,576.65
Misc.						\$663.62
Total	\$12,248.14	\$7,114.97	\$12,230.30	\$14,525.63	\$20,624.11	\$67,406.77

This request must consist of only reasonable fees and costs for the customer to prepare and participate in a proceeding that results in a substantial contribution. It is not unreasonable to expect wildfires and earthquakes in California. Therefore it is reasonable to expect utilities like SDG&E to stand ready, well organized, and prepared to respond. For this catastrophe, like any other, ORA, and other intervenors have the right to examine whether SDG&E was reasonable in its response. But, only those fees and costs associated with the customer's work that the Commission concludes made a substantial contribution are reasonable and eligible for compensation.

To assist us, D.98-04-059 directed customers to demonstrate productivity by assigning a reasonable cost to the benefits of their participation. The costs should bear a reasonable relationship to the benefits of their participation. UCAN's showing made this demonstration. For example, UCAN proposed

two adjustments, \$582,300 and \$113,111, to the \$5,454,000 spent by SDG&E for Food Services.⁸ ALJ Long's proposed decision would have adopted part of the first adjustment. UCAN spent \$12,230 – equal to 2% of its recommendation but only 0.2% of SDG&E's costs – to examine SDG&E's costs for Food Services. However, neither the ALJ nor the Commission accepted both of UCAN's food service adjustments. UCAN proposed (1) that SDG&E did not control excessive unit costs that food vendors charged for beverages. The ALJ agreed that this reflected a failure to control contract costs. The ALJ rejected UCAN's other food service adjustment: UCAN argued that SDG&E and vendors did not count and control the number of meals served and that the prices paid to vendors should have been on a per meal basis. The ALJ did not agree that food should be counted on a "meal" basis, and if a few people over-ate or a few unauthorized people managed a free meal, the costs were not important in the context of greater project. UCAN's costs are reasonable when compared to the potential benefit to other customers. But, our policy is to only compensate intervenors when we find they make a substantial contribution. We will disallow \$6,000 of the food costs and \$2,000 (about 10%) of post-hearing costs for UCAN's meal-count proposal.

The Commission's decision on UCAN's accounting issues proposals was a discretionary choice by the Commission to allow a more rapid recovery of Wildfire costs. UCAN was not unreasonable in its proposal, as shown in the ALJ's proposed decision, where UCAN's recommendation was found to be the superior technical answer. We find that UCAN's \$14,525.63 expense was

⁸ ALJ's proposed Decision, *mimeo.*, pp. 19 – 24.

reasonable and UCAN contributed to the Commission's decision-making process.

There is an unquantifiable benefit from UCAN's overall participation even though UCAN's recommendations were rejected in the final decision. An independent review by ORA, UCAN, or any other intervenor, may cause SDG&E (or any utility) to exercise greater care to avoid unreasonable costs. Thus, we find that UCAN made a valuable contribution by performing a reasonableness review to test the prudence of SDG&E's decisions, procedures and actions. Its costs of \$7,114.97 are reasonable for the scope of this proceeding. Additionally, we find the general preparation costs as reasonable and necessary for UCAN to plan and prepare a competent intervention. Finally, after the \$2,000 disallowance above, we find balance of \$18, 624.11 in post hearing costs to be reasonable for UCAN to prepare briefs and comments.

Next, we must assess whether the hours claimed for the customer's efforts resulting in a substantial contribution to the Commission's decision that SDG&E's costs are reasonable. UCAN documented its claimed hours by presenting a breakdown of the hours by category and a brief description of each activity. The detailed explanation of the hours describes the work task with reference to the litigated issues and the hourly breakdown reasonably supports the claim for total hours. UCAN's request is reasonable based on these records.

Finally, to determine compensation, we consider the market rates for similar services from comparably qualified persons. UCAN requests an hourly rate of \$250 for attorney Shames for work performed in 2004 and 2005, and \$185 for attorney Biddle for work performed in 2004. We previously approved these rates for Shames and Biddle in D.05-09-011. UCAN requests an hourly rate of \$150 for economist Schilberg, and \$195 for economist Marcus, for work

performed in 2004. We previously approved these rates for Schilberg and Marcus in D.05-06-031. We will use these existing rates without further discussion.

UCAN requests a \$165 rate for Schilberg for slightly less than one hour of work performed in 2005. For this minor time we will apply 2004 rates, without setting a precedent for 2005 work in other proceedings, resulting in a decrease of less than \$20 from the amount requested.

UCAN itemized \$663.62 in direct expenses which include costs for travel, photocopying, postage, etc. The cost breakdown shows the direct expenses to be commensurate with the work performed. We find these costs reasonable.

8. Award

We award UCAN \$59,388.92 as compensation for its contributions to D.05-08-037. Consistent with previous Commission decisions, we order that interest be paid on the award amount (at the rate earned on prime, three-month commercial paper, as reported in Federal Reserve Statistical Release H.15) beginning the 75th day after UCAN filed its compensation request, and continuing until full payment of the award is made.

We remind all intervenors that Commission staff may audit their records related to this award and that intervenors must make and retain adequate accounting and other documentation to support all claims for intervenor compensation. UCAN's records should identify specific issues for which it requested compensation, the actual time spent by each employee or consultant, the applicable hourly rate, fees paid to consultants, and any other costs for which compensation was claimed.

9. Waiver of Comment Period

This is an intervenor compensation matter. Accordingly, as provided by Rule 77.7(f)(6) of our Rules of Practice and Procedure, we waive the otherwise applicable 30-day comment period for this decision.

10. Assignment of Proceeding

Michael R. Peevey is the Assigned Commissioner and Douglas M. Long is the assigned ALJ in this proceeding.

Findings of Fact

1. UCAN satisfied the procedural requirements necessary to claim compensation in this proceeding.
2. UCAN made a substantial contribution to D.05-08-037 on SDG&E's 2003 Wildfires catastrophic event as described.
3. The hours and itemized direct expenses claimed by UCAN were reasonable and consistent, as modified, with the scope of its participation in this proceeding.
4. UCAN did not make a substantial contribution with respect to its meal-count recommendation and \$8,000 of UCAN's costs, as allocated herein to this effort, are disallowed.
5. The total of the reasonable compensation is \$59,388.92.
6. The Attachment to today's decision summarizes this award.

Conclusions of Law

1. UCAN fulfilled the requirements of Pub. Util. Code §§ 1801-1812, which govern awards of intervenor compensation, and is entitled to its claimed compensation incurred in making substantial contributions to D.05-08-037.
2. UCAN should be awarded \$59,388.92 for its contribution to D.05-08-037.

3. Per Rule 77.7(f)(6), the comment period for this compensation decision may be waived.

4. This order should be effective today so that UCAN may be compensated without further delay.

O R D E R

IT IS ORDERED that:

1. The Utility Consumers' Action Network, (UCAN) is awarded \$59,388.92 as compensation for its substantial contributions to Decision (D.) 05-08-037.

2. Within 30 days of the effective date of this decision, San Diego Gas & Electric Company shall pay UCAN the total award. Payment of the award shall include interest at the rate earned on prime, three-month commercial paper as reported in Federal Reserve Statistical Release H.15, beginning on the 75th day after the filing date of UCAN's request for compensation, and continuing until full payment is made.

3. The comment period for today's decision is waived.

4. The proceeding is closed.

This order is effective today.

Dated _____, at San Francisco, California.

Compensation Decision Summary Information

Compensation Decision:	D	Modifies Decision?
Contribution Decision(s):	D0508037	
Proceeding(s):	A0406035	
Author:	ALJ Long	
Payer(s):	San Diego Gas & Electric Company	

Intervenor Information

Intervenor	Claim Date	Amount Requested	Amount Awarded	Multiplier?	Reason Change/Disallowance
Utility Consumers' Action Network, (UCAN)	10/11/05	\$67,408	\$59,388.92	No	Disallow half of one issue because UCAN did not make a substantial contribution. Adjustment for minimal hours in 2005.

Advocate Information

First Name	Last Name	Type	Intervenor	Hourly Fee Requested	Year Hourly Fee Requested	Hourly Fee Adopted
Michael	Shames	Attorney	UCAN	\$250	2004/05	\$250
Lee	Biddle	Attorney	UCAN	\$185	2004	\$185
Gayatri	Schilberg	Economist	UCAN	\$150	2004/05	\$150
William	Marcus	Economist	UCAN	\$195	2004	\$195